Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM R. TIBOLT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Opinion Below Is Inconsistent With This Court's Decision In *Illinois* v. *Rodriquez*, 497 U.S. 177 (1990) Regarding Warrantless Searches of Residences?

II. Whether The First Circuit Erroneously Held That The Activation Of An Alarm At One Residence Is An External Sign Of Forced Entry At A Completely Different Residence?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (App. A1-A15) is reported at 72 F.3d 965 (1st Cir. 1995).

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1995. A petition for rehearing was denied on January 22, 1996. (App. A17). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

The Fourth Amendment provides:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On March 18, 1994, the petitioner was convicted on a money laundering charge, 18 U.S.C. § 1956, in the United States District Court for the District of Massachusetts. On November 8, 1994, the trial court sentenced the petitioner to 86 months imprisonment on Count 15, a $500,000.00 fine, and three years supervised release. The petitioner appealed a trial court ruling relating to financial records seized from his home in a warrantless search which served as the basis of his conviction.

At a pre-trial hearing on the Defendant's Motion to Suppress, the following facts were established. On July 27,1992 at 10:05 A.M., an officer of the Gloucester Police Department on routine patrol was notified that a house alarm had been activated at 13 Old Salem Path, the home of one Joseph Dombrowski.[1] The officer responded to what appeared to him as two separate driveways. (Tr. 20). Upon turning his cruiser into the drive-

[1] Transcript citations to the Motion to Suppress hearing dated January 26, 1994, hereinafter will be abbreviated by page, designated "Tr." (Tr. 19).

way, he noticed a mailbox with the name Dombrowski written across the side and an arrow painted on it. In response to the Court's question as to whether he heard an alarm going off when he arrived on the scene, he stated "[n]one at all; none on the street at all, no."[2] (Tr. 21-23).

As a result of observing the name "Dombrowski" on the mailbox, the officer claimed he mistakenly assumed that the "first house up the driveway behind the mailbox" was the Dombrowski residence. However, he observed another mailbox with the number 11 written on it, but he never sought to verify the actual location of the house connected with the mailbox designated as number 11. (Tr. 41-44). He testified that he then "checked the windows, doors, anything that might lead him to believe there was a break, as far as whether they were unlocked or anything broken or anything that might indicate a break in progress or had been a break." After checking the front door, all the windows, and the entire exterior of the house in general, the officer stated that the house appeared secure. Thereafter, he proceeded "around the water side, and then observed a deck and a staircase leading up the deck." He went up the stairs and onto the deck where he saw a door leading into the house. It was closed. (Tr. 24-25). Consistent with his observations of the front of the house, he found no signs of forced entry. Palazzola said he tried the rear deck door, found it closed but unlocked, and opened it. He stated, "[a]t that time I peeked into the house and called out hello or something to that effect, seeing if I got a response." When asked what he was thinking at that point, he stated, "[w]ell, I believed either I had a break in the house or somebody's around the house that owns the house and had accidentally set off the alarm." When he received no response, he shut the door

[2] On cross-examination, the officer admitted that the police are frequently notified of alarms that are invariably false alarms from his experience. (Tr. 31).

and called for backup.[3] (Tr. 25). After five minutes, another Gloucester Police officer arrived on the scene. Both officers entered the house and checked each room on the first floor but found no indication of a burglary or break in. The officer claimed that "we were checking to see if we had anybody inside the house, whether we had a breaking and entering or whatever." They proceeded to check the "top floor" and again found no signs of a burglary or a break in. At that point the officer stated "[w]ell, we could detect an odor, what appeared to us to be marijuana, but even at that point, we were still concerned of a break, more than anything else. And we started down to the ground floor or basement floor, I guess you'd call it." He testified that, "[w]e observed bright lights, we observed fans, and numerous plants being grown." When asked whether he could identify the plants, he stated, "I had a good indication they were marijuana plants." At the conclusion of his testimony, he was again asked why he entered the home at 11 Old Salem Path: "I believed at the time that we had either a break in progress or that an alarm had sounded and somebody may have accidentally set off the alarm." (Tr. 26-30).

A Lieutenant of the Gloucester Police Department testified that after speaking to Officers on the scene, he proceeded to the clerk's office to obtain a search warrant. He requested a search warrant for "11-13 Old Salem Path, occupied by William Tibolt and Joseph Dombrowski". McLeod stated that thereafter he obtained a second search warrant for 11 Old Salem Path, in the name of William Tibolt. (Tr. 65-67). The district court denied the petitioner's Motion to Suppress without issuing a written opinion.

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[3] The officer did not attempt to confirm whether he arrived at the correct residence when he called for back up, nor did he inquire whether the alarm company had cleared the alarm through the automated surveillance system located at their control center.

ARGUMENT

I. THE OPINION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *ILLINOIS* v. *RODRIGUEZ*, 497 U.S. 177 (1990) REGARDING WARRANTLESS SEARCHES OF RESIDENCES.

It is well established that a warrantless search of a private residence is the "chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972).

Warrantless searches of a home are thus presumptively unreasonable unless the police can prove consent or probable cause and the existence of exigent circumstances. *Id.* at 41. *See Arizona* v. *Hicks*, 480 U.S. 321, 327 (1987); *Payton* v. *New York*, 445 U.S. 573, 586 (1980); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-75 (1971). This Court has also held that exigent circumstances exist when there is probable cause for the search or seizure and evidence is in imminent danger of destruction, the safety of law enforcement officers or the general public is threatened, the police are in hot pursuit, or a suspect is likely to flee before the officer can obtain a warrant. *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973); *Warden* v. *Hayden*, 387 U.S. 294, 298-99 (1967); *Schmerber* v. *California*, 384 U.S. 757, 761-77 (1966).

In reviewing the instant case for indicia of "exigent circumstances," the First Circuit relied repeatedly on this Court's Opinion in *Illinois* v. *Rodriquez*, 497 U.S. 177 (1990). It is submitted that certiorari should be granted because the Court below inappropriately applied the facts of this case to the legal analysis set out in *Rodriquez*. First, *Rodriquez*, unlike this case, involved an officer's mistaken, but reasonable belief, that they had obtained valid "third-party consent" to search a residence. *Id.* at 44. Second, *Rodriquez* did not extend the "good-faith" exception beyond the specifically delineated fac-

tual parameters of a "third-party consent" situation. Third, it was clear, based on the facts presented to the Court in *Rodriquez*, that its findings were predicated on conclusion that the objective facts known to, or *discoverable* by, the officers at the time of the search supported their contention that exigent circumstances existed. In the instant case, the First Circuit suggests that this Court's decision in *Rodriquez* should be read broadly to encompass all "good-faith" warrantless searches. However, none of the facts in this case remotely resemble the circumstances or analysis utilized by this Court in *Rodriguez*.

It is respectfully submitted that cases discussing "exigent circumstances" cited by the First Circuit are uniformly inapposite to the facts presented to the district court in this case. For example, in *Archibald* v. *Mosel*, 677 F.2d 5, 6 (1st Cir. 1982), a man who had been robbed told two policeman ten to fifteen minutes after the robbery that an unknown assailant had robbed him of $105 and that he had chased the robber into apartment 2005 at 300 Ruggles Street. After the victim assured the police that the robber had entered apartment 2005, the police knocked on the door. Although there was no response, the officers heard furniture being moved inside. After announcing their presence and hearing only the same noises in response, they broke in through a window. When they entered they found no robber, only a small child. Unlike the facts presented in *Archibald*, a variant on the well established "hot pursuit" exigency, no new exigency blossomed between the Gloucester Police officer's deployment to 13 Old Salem Path and his decision to enter the residence located at 11 Old Salem Path. Therefore, the decision to enter the residence, contrary to the facts in *Archibald*, was not prompted by any activity in the house or any exigent circumstances known to the officers beyond finding a closed but unlocked door.

More importantly, the decision of the First Circuit is contrary to the analysis specified by this Court in *Rodriquez* which

directs reviewing courts to determine whether an officer's warrantless search was valid based on facts known or discoverable prior to the entry. The First Circuit, it is submitted, has chosen to superimpose its own conclusions regarding whether an officer held a firm and rea onable belief, not one based on speculation or conjecture, as to whether he was confronted with a compelling necessity for immediate action that would not brook the delay of obtaining a warrant. Dissimilar to the facts in *Archibald*, and each of the other cases cited by the First Circuit in its opinion, the particular officer did not have a firm and reasonable belief that the facts presented to him prior to entering the residence confirmed his belief that a robbery was in progress. At the suppression hearing, the officer freely admitted that there may have been several innocent reasons for both the alarm and the unlocked door. As a result, contrary to the First Circuit's assessment of the facts confronting the officer at the time of the warrantless entrance, the officer entered the residence to see whether the owner had accidentally set off the alarm, whether a break was in progress or for "whatever" other reason one could imagine. (Tr. 25).

Many of the factual assertions utilized by the First Circuit in its analysis were wholly unsupported or contradicted by the record. For example, the First Circuit opined that after the officer found no signs of forced entry, "he found an unlocked door on the rear deck and received no response to his efforts to communicate with anyone who might be inside." These circumstances, the Circuit Court found, "enhanced the likelihood of an intruder." Once again it is submitted that the record failed to support that conclusion. The officer who made the decision to make a warrantless entry of the residence simply stated that a "break" in was but one possibility among many he considered in light of the circumstances then confronting him.

A careful reading of the cases relied on by the First Circuit establishes that a police officer confronted with "exigent cir-

cumstances" must have a reasonable belief that he is responding to an *actual* emergency situation, not merely the *possibility* of exigency among a variety of equally plausible, less threatening, possibilities. *See, e.g., United States* v. *Donlin*, 982 F.2d 31, 34 (1st Cir. 1992); *Hegarty* v. *Somerset Cty.*, 53 F.3d 1367, 1374 (1st Cir. 1995). In effect the First Circuit has held, contrary to this Court's opinion in *Rodriquez*, *supra*, that the exigent circumstances exception to the warrant requirement authorizes the police to make warrantless entries into private residences in order to confirm *subjective* beliefs regarding the *possibility* of criminal activity.

The First Circuit also confuses two well settled axioms. First, when examining the lower court record with respect to "probable cause," the reviewing court must examine probabilities. Second, when dealing with "exigent circumstances," however, the reviewing Court may not consider mere probabilities. It must find that the officer had a "reasonable belief based on facts known, or discoverable at the time," that supported his contention that exigent circumstances justified his warrantless entry. *Rodriguez*, 497 U.S. at 186.

The First Circuit, it is submitted, failed to address, *de novo*, facts that supported the petitioner's argument that an officer, in the circumstances of this case, should have taken reasonable steps to *discover* facts (several of which were readily available in this case) to dispel any confusion regarding the location of the residence from which an alarm had been activated. *See Rodriquez*, 497 U.S. at 186. In this regard, at the suppression hearing, the officer testified that under similar situations his *usual* procedure was to verify the registrations of automobiles located on the property in order to establish whether he was at the correct address or to establish the identity of a possible intruder on the premises. This reasonable precaution to *all* investigations involving a possible break in was not done. Any officer reasonably concerned about a possible break should have

followed his admittedly routine practice of identifying the vehicles at the location. (Tr. 23). The facts at the suppression hearing established that the petitioner's car was in his driveway, and had the "routine" practice of identifying vehicles been followed, the officer would have discovered that he was at the wrong residence.

In applying the facts of this case to the analysis established by this Court in *Rodriquez*, the First Circuit chose to ignore objectively reasonable steps that would have immediately informed the officers that they had arrived at the wrong location. The first, minimally reasonable step, checking vehicles located on the premises, would have immediately alerted the officer to a possible intruder or, in this case, the fact that he had gone to the wrong residence.

Further strength is added to the petitioner's position when this Court considers another reasonable step the officers should have taken yet was ignored by the First Circuit. The officer testified that when he arrived at what he believed to be 13 Old Salem Path he did not hear an active alarm at that residence or any other residence on the street. Based on this fact, coupled with his initial confusion as to the location of 13 Old Salem Path, it would have been objectively reasonable for Palazzola to contact the police dispatcher in order to discover whether the alarm company, customary with its normal procedure, had cleared the alarm; a procedure the officer testified he was aware of due to his vast experience with false alarms. (Tr. 23). Finally, it should be noted that the First Circuit chose to ignore critical facts known to the second officer who arrived at the scene. That officer knew that he was at 11 Old Salem Path and not the residence to which the first officer was dispatched, 13 Old Salem Path. (Tr. 52-53).

Based on this Court's articulation in *Rodriquez* regarding an inquiry into discoverable facts that were reasonably available to the officers at the time, the facts in this case should have

certainly prompted a reasonable police officer to make further inquiry before conducting a warrantless entry into a residence, and thus the decision of the First Circuit is contrary to this Court's established precedent and should be reversed.

II. The First Circuit Erroneously Held That the Activation of An Alarm at One Residence Is An External Sign of Forced Entry At a Completely Different Residence.

The discovery of a closed but unlocked door by police mistakenly investigating the petitioner's home for a possible burglary is not an "objectively reasonable basis upon which it could have been thought necessary immediately to enter" the Tibolt residence. *See, e.g., United States* v. *Moss*, 963 F.2d 673 (4th Cir. 1992). *See also United States* v. *Erickson*, 991 F.2d 529, 530 (9th Cir. 1993); *United States* v. *Gillenwaters*, 890 F.2d 679 (4th Cir. 1989).

In an effort to justify the officers warrantless search without any sign of forced entry, the First Circuit stated that "we think it clear the activation of an alarm system is an external sign of a possible forced entry." *United States* v. *Tibolt*, 72 F.3d 965, 970 (1st Cir. 1995). Although the activation of an alarm at a residence containing such an alarm may be a sufficient external sign of a possible break, the petitioner's case presented no such facts. Here, the officers responded to the wrong residence, one that neither had an activated alarm nor a burglary in progress. As stated above, the officers could have taken any number of reasonable steps to confirm whether they had arrived at the correct residence, but chose instead to effect an immediate warrantless entry into the petitioner's home.

More particularly, the precedent of this Court specifically and unequivocally states that "exigent circumstances," sufficient to justify a warrantless entry into a private home, exist only where law enforcement officers confront a compelling

necessity for immediate action which is based upon properly assessed facts reasonably known, or reasonably discoverable. *Rodriguez*, 497 U.S. at 185-186; *Cupp* v. *Murphy*, 412 U.S. at 294; *Warden* v. *Hayden*, 387 U.S. at 298. For these obvious reasons, a warrantless search of a private residence is deemed presumptively unreasonable under the Fourth Amendment. *See Payton* v. *New York*, 445 U.S. 573, 586 (1980). Contrary to this Court's precedent, the First Circuit held, without citation to any authority, that the activation of an alarm system, based on the facts of this case, even when it occurs at a different residence, is an external sign of forced entry. *United States* v. *Tibolt*, 72 F.3d at 970 n.5. Because the First Circuit holding does not comport with the precedent of this Court, the petitioner's request for Certiorari should be granted. *See*, *e.g.*, *Arizona* v. *Hicks*, 480 U.S. at 327; *Coolidge v. New Hampshire*, 403 U.S. at 327; *Payton* v. *New York*, 445 U.S. at 586; *Cupp* v. *Murphy*, 412 U.S. at 294.

The First Circuit relied on *Murdock* v. *Stout*, 54 F.3d 1437, 1443 (9th Cir. 1995) to support its position that exigent circumstances, *i.e.*, an external alarm at a different residence, justified a warrantless entry. The facts, however, in *Murdock*, it is respectfully submitted, are inapposite to the facts of this case. In *Murdock*, the investigating officers, arrived at the *correct* location, observed *clear* signs that a resident might have been at home when the intruder entered the dwelling, and after receiving no response to their calls, and entered the dwelling for fear, in their own words, that the resident might be in danger. In this case, not only did the police not testify in such a manner, they failed take the most rudimentary steps to discover facts regarding whether they arrived at the correct residence, and presented no facts which confronted them that could have suggested that anyone was in danger. The testimony during the suppression hearing made it clear that they did not have a firm conviction as to whether an actual break had occurred, let alone whether anyone was in harm's way.

Simply put, when a possible burglary is reported to the police, the facts reasonably known or discoverable by the responding officers must support a reasonable belief that a burglary has in fact been committed at that location before they may undertake a warrantless entry. If the Gloucester Police were at least at the correct home investigating a burglar alarm, an issue would arise as to whether the facts or circumstances justified a warrantless entry based on "exigent circumstances." However, in this case, not only did officers arrive at the wrong residence, they testified that after a thorough check of all the windows and doors on the first floor, they found everything secure, and made absolutely no observations of forced entry. It is the petitioner's position that an external alarm, at a completely different residence than the one ultimately searched can never be considered an external sign of break that could provide the police with a sufficient legal basis to conduct a warrantless search, particularly where all of the circumstances presented failed to provide an objectively reasonable belief that a burglary had either occurred or was in progress at the residence to which the police responded.

Because the burden on the police to confirm whether they arrived at the correct residence in this case was minimal, yet ignored, the rights protected by the Constitution and acknowledged by this Court insuring persons to be secure in their homes has been violated, and this Court should grant this defendant's Petition For Writ of Certiorari. Given the facts and circumstances of this case, it is submitted that the First Circuit's analysis simply leaves too elastic the standard of "exigent circumstances," endangering the premise of the Fourth Amendment as a shield against government mischief and overreaching.

CONCLUSION

Based on all the foregoing arguments and authorities, it is submitted that the defendant's Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2221

UNITED STATES OF AMERICA,
APPELLEE,

v.

WILLIAM R. TIBOLT,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, U.S. DISTRICT JUDGE]

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

Anthony M. Cardinale, with whom Nicholas J. DiMauro and Law Offices of Anthony M. Cardinale were on brief for appellant.

William C. Brown, Attorney, Appellate Division, Department of Justice, with whom Donald K. Stern, United States Attorney, was on brief for appellee.

December 29, 1995

CYR, *Circuit Judge*. Following his conviction on a money laundering charge, 18 U.S.C. § 1956, in the United States District Court for the District of Massachusetts, William Tibolt appeals two trial court rulings relating to incriminating financial records seized from his residence in a warrantless search. Finding no error, we affirm.

I

BACKGROUND

Around mid-morning on July 27, 1992, a security alarm activated in the Dombrowski residence located at 13 Old Salem Path in Gloucester, Massachusetts. As the security alarm company — JK Security — was unable to make telephone contact with the Dombrowski residence to determine whether the alarm had been set off accidentally, it telephoned the Gloucester Police to report the alarm. Officer Joseph Palazzola was dispatched to investigate the alarm report at the Dombrowski residence, which is next door to the Tibolt residence at 11 Old Salem Path.

Both residences are set well back from Old Salem Path and largely concealed from view. Two driveways — separated by a tree and some shrubbery — lead to the Tibolt home. The Tibolt mailbox — bearing "11 Old Salem Path" — is located immediately to the right of the first Tibolt driveway. The Dombrowski mailbox — marked "dombrowski ↑ 13" — is located a few feet left of the second Tibolt driveway, more than 60 feet before the driveway entrance to the Dombrowski residence at 13 Old Salem Path.

Upon observing the mailbox marked "13," Officer Palazzola mistakenly entered the second driveway to the Tibolt residence. He checked the exterior of the residence for signs of an attempted break, or burglary in progress. Although he noted no signs of forced entry, Palazzola found an unlocked door on the rear

deck. He opened the door and called inside to alert any occupant, but received no response. Given that the police had been requested to investigate the alarm, that a door was unlocked, and that Palazzola had been unable to make contact with anyone inside the house, he reasoned that the alarm might not have been activated accidentally.

Palazzola promptly called for backup, and Officer Thomas Williams arrived within five minutes. Williams likewise drove to the Tibolt residence rather than the Dombrowski residence, because he saw Palazzola's squad car parked next to the Tibolt residence. Williams immediately recognized the Tibolt residence as having been the target of a prior investigation by a Gloucester Police drug task force in which he had participated. Williams was unsure, however, whether the target (*viz.*, Tibolt) of the task force investigation still owned the residence, or whether it was still under investigation for drug-related activities.

Palazzola and Williams decided to make an immediate warrantless entry through the unlocked rear door, then looked about for possible explanations for the alarm (*e.g.*, any occupants, a burglar, "whatever"). Their search was limited in scope, eschewing drawers, cabinets and containers. The officers "secured" each room, to rule out the presence of intruders, captives, or injured occupants. After sweep-searching the upper floors, the officers discovered a well-established marijuana-growing facility in the basement, then left to obtain a search warrant.[1] Later, armed with a warrant, the officers searched the Tibolt premises and seized incriminating financial records which Tibolt subsequently sought to suppress on the ground that the evidence

[1] The warrant application related the following grounds: (1) an intrusion alarm was reported by J.K. Systems to the Gloucester Police Department; (2) Officers Palazzola and Williams responded to the alarm report and found a door open; (3) the officers entered the home to check the premises for intruders; and (4) a marijuana-growing facility was found in the cellar.

relied on in the supporting affidavit was itself the fruit of the earlier warrantless search. After hearing, the district court denied the motion to suppress, with elaboration.

Following the verdict, Tibolt moved for a new trial on the ground that he had uncovered "new" evidence relating to the suppression motion which would (1) impeach Palazzola's suppression hearing testimony, (2) suggest that the Gloucester Police deliberately planned to search the Tibolt residence, and (3) demonstrate a *Franks* v. *Delaware*, 438 U.S. 154, 155-56 (1978), violation. Gloucester Police Department "incident cards," which record the time, date, desk officers, and location of police assignments, disclosed that officers had been called to Old Salem Path on at least fourteen prior occasions to investigate security alarms. The cards reflect that there were three calls to "13 Old Salem Path" and ten others to "Old Salem Path." One card, dating from 1990, indicates that Officer Joseph Palazzola had been sent to the Dombrowski residence to investigate a security alarm. And two cards indicate that a desk officer with the initials "J.P." had dispatched other officers to "Old Salem Path." In addition, an affidavit by Officer Theodore Lemieux, dated January 17, 1994 — *the day after the Tibolt suppression hearing* — and submitted in support of a search warrant application in an *unrelated* criminal proceeding, stated that

> *an informant . . . has provided information that led to the arrest and indictment of one William Tibolt.* In the investigation the informant provided detailed information in regard to the location of an indoor growing operation that Mr. Tibolt had in his home. The informant provided the name, address as well as other persons that were involved in the marijuana-growing operation. The informants [*sic*] also described the home and the interior as well as a room in

> the center of the basement that [*sic*] the growing operation was being conducted. (Emphasis added.)

But for the fact that it contains no indication as to the timing of the events described in it, the Lemieux affidavit might conflict with the affidavit submitted in support of the search warrant application of July 27, 1992, *see supra* note 1, which described JK Security's call to the Gloucester Police Department, the police response, and the officers' *unexpected* discovery of marijuana in the Tibolt basement. After hearing, the district court denied the motion for new trial. *United States* v. *Tibolt*, 868 F.Supp. 380, 381-83 (D.Mass. 1994).

II

DISCUSSION

A. *Motion to Suppress*

Tibolt first challenges the district court's *pretrial* denial of the motion to suppress the primary evidence of money laundering: the financial records seized from his residence on July 27, 1992. He contends that there was no objectively reasonable basis for believing that a life-threatening burglary was in progress, even assuming that Officer Palazzola reasonably had mistaken the Tibolt residence for the Dombrowski residence. *But see infra* Section II.B. And he argues that inspection of the exterior of the Tibolt residence revealed no signs of forcible entry, and no open windows or doors. *See* Brief for Appellant at 27-29 (citing *United States* v. *Erickson*, 991 F.2d 529 (9th Cir. 1993) (suppressing evidence seized in warrantless search of residence where officers investigating burglar alarm observed no indication of forced entry)).

1. *Substantive Law*

A warrantless search of a private residence is presumptively unreasonable under the Fourth Amendment. *See Payton* v. *New York*, 445 U.S. 573, 586 (1980). The government therefore must prove that the initial search came within some recognized exception to the Fourth Amendment warrant requirement. *See United States* v. *Doward*, 41 F.3d 789, 791 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1716 (1995). Generally speaking, absent probable cause and exigent circumstances the Fourth Amendment bars warrantless, nonconsensual entries of private residences. *See United States* v. *Curzi*, 867 F.2d 36, 41 (1st Cir. 1989).[2]

Probable cause will be found to have been present if the officers at the scene collectively possessed reasonably trustworthy information sufficient to warrant a prudent policeman in believing that a criminal offense had been or was being committed. *See Hegarty* v. *Somerset City*, 53 F.3d 1367, 1374 (1st Cir. 1995), *cert. denied*, No. 95-629, 1995 WL 625553 (U.S. Dec. 11, 1995); *United States* v. *Zurosky*, 614 F.2d 779, 784 n.2 (1st Cir. 1979) (finding probable cause where police investigated possible "breaking and entering" at warehouse), *cert. denied*, 446 U.S. 967 (1980) (citing *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949)). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and

[2] The government would have us characterize this warrantless entry as a so-called "community caretaker" search, a warrant exception applicable to searches "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady* v. *Dombrowski*, 413 U.S. 433, 441, 447-48 (1973). In light of our alternative disposition, we need not consider the "community caretaker" exception. *But see id.* at 439 (noting "constitutional difference" between search of home and search of automobile); *see also United States* v. *Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (reading *Cady* as applying only to searches of automobiles, not homes); *Erickson*, 991 F.2d at 532 (same); *United States* v. *Pichany*, 687 F.2d 204, 209 (7th Cir. 1982) (same).

practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983).

Exigent circumstances exist where law enforcement officers confront a "compelling necessity for immediate action that w[ould] not brook the delay of obtaining a warrant." *United States* v. *Wilson*, 36 F.3d 205, 209 (1st Cir. 1994) (citing *United States* v. *Adams*, 621 F.2d 41, 44 (1st Cir. 1980)); *United States* v. *Almonte*, 952 F.2d 20, 22 (1st Cir. 1991), *cert. denied*, 503 U.S. 1010 (1992). Although "exigency" determinations invariably are fact-intensive, *see United States* v. *Donlin*, 982 F.2d 31, 34 (1st Cir. 1992), "exigent circumstances" commonly include: "(1) 'hot pursuit' of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to [an occupant]." *Hegarty*, 53 F.3d at 1374. The "exigent circumstances" inquiry is limited to the objective facts reasonably known to, or discoverable by, the officers at the time of the search. *See Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990) (upholding warrantless search where police officers reasonably, but mistakenly, believed they had obtained valid "third-party consent" to search residence from person with authority to consent) (citing *Archibald* v. *Mosel*, 677 F.2d 5 (1st Cir. 1982) (invoking "good faith" principle under "exigent circumstances" exception)).

2. *Standard of Review*

As mixed questions of law and fact, the "probable cause" and "exigent circumstances" determinations require bifurcated review: whether a particular set of circumstances gave rise to "probable cause" or "exigent circumstances" is reviewed *de novo* and findings of fact are reviewed for clear error. *United*

States v. *Goldman*, 41 F.3d 785, 786 (1st Cir. 1994) (probable cause), *cert. denied*, 115 S.Ct. 1321 (1995); *United States* v. *Gooch*, 6 F.3d 673, 678 (9th Cir. 1993) (exigent circumstances). Where, as here, there are no explicit factual findings, the record below is assessed in the light most favorable to the trial court ruling. *See United States* v. *Baldacchino*, 762 F.2d 170, 176 (1st Cir. 1985).

3. *Application of Law*

Tibolt does not challenge the factual findings implicit in the district court ruling, given that the evidence most central to the ruling — the police descriptions relating to the alarm report, the locations of the mailboxes, the unlocked door — is undisputed.[3] Moreover, these implicit findings unquestionably support the challenged legal conclusion that Officer Palazzola had probable cause to believe a breaking and entering had been or was being committed at the Tibolt residence.

A security alarm had been activated, and when JK Security placed a call to the Dombrowski residence, it had received no answer.[4] These circumstances severely undercut any likelihood

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[3] On appeal, Tibolt asserts no direct challenge to the *objective* "reasonableness" of Palazzola's putative mistake — purportedly caused by the juxtaposition of the Dombrowski mailbox and the entrance to Tibolt's second driveway — in investigating the Tibolt residence, instead of Dombrowski's, for a burglary in progress. Rather, he questions only whether Palazzola, despite his protestations to the contrary, knowingly used this fortuitous circumstance as a pretext for conducting a warrantless search for drugs as part of an ongoing task force investigation targeting the Tibolt residence. The only evidence of such a ruse, however, was presented in his *post-conviction* motion. *See infra* Section II.B. At the *pretrial* hearing, the inquiry into Palazzola's state of mind necessarily turned, for the most part, on the trial court's observation of Palazzola's demeanor, and its credibility determination, matters uniquely within the province of the trier of fact. *United States* v. *Zapata*, 18 F.3d 971, 975 (1st Cir. 1994).

[4] Tibolt cites cases involving various external indicia of a "break," *see, e.g.*, *Commonwealth* v. *Fiore*, 403 N.E.2d 953, 955 (Mass. Ct. App.) (upholding warrantless search where outer door found broken off hinges), *cert. denied*, 449 U.S. 938 (1980), *but no alarm system activation*. *See Erickson*, 991 F.2d at 530, 533 (noting that government, on appeal, had conceded that no "exigent circumstances" had been

that the security alarm had been activated inadvertently by a resident. Moreover, upon his arrival, *approximately ten minutes later*, Palazzola checked all windows and doors at the Dombrowski residence.[5] Instead of finding all doors secured, as one might reasonably expect while the residents were away, he found an unlocked door on the rear deck and received no response to his efforts to communicate with anyone who might be inside. These circumstances significantly enhanced the likelihood of an intruder.

For similar reasons, we conclude that Palazzola was presented with "exigent circumstances" permitting an *immediate* warrantless entry. Without entering, he could not know but what an intruder had managed to get into the residence, and even injured or captured a resident, then fled; or had been caught off guard by the police and remained in the residence

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shown, given the absence of any activated security alarm; no visible sign of forced entry; witness reports that suspected burglars had departed area 30 minutes before police officers' arrival; and officers' failure to "knock and announce" before entry); *United States* v. *Moss*, 963 F.2d 673, 677, 679 (4th Cir. 1992) (invalidating search because "the Government has formally conceded that this is not an 'exigent-circumstance case' and does not seek to uphold the search here on that basis," given that police officer observed "no [external] indication that any illegal occupant was inside" the cabin); *Commonwealth* v. *Bates*, 548 N.E.2d 889, 892-93 (Mass. Ct. App. 1990) (invalidating search where police did not even suspect an ongoing crime, but were merely investigating a "missing person" report, after waiting over three hours before investigating missing person's apartment); *State* v. *Morgavi*, 794 P.2d 1289, 1292-93 (Wash. Ct. App. 1990) (invalidating search based on police observation of "a car in front of the garage, opened and partially broken doors to the garage, an open back door to the house and an open side door to the garage," but distinguishing cases where "the police were summoned to the premises by concerned neighbors who had witnessed the burglaries and the flight of suspects"). We think it clear that the activation of an alarm system is an external "sign" of a possible forced entry.

[5] Although the Dombrowski residence bore a "JK Security" sticker, and the Tibolt residence an "ADT Security" sticker, there was no evidence that Palazzola had been informed by the dispatcher that JK Security had reported the alarm. Further, while dispatchers sometimes write the name of the reporting security company on the incident cards, *see infra* Section II.B., the investigating officers do not receive these cards for completion until *after their investigation of the alarm report. In any event, Tibolt has not raised this matter. See supra* note 3.

with a forcibly detained resident. Even the authorities cited by Tibolt acknowledge the potential exigencies attending such circumstances. *See Erickson*, 991 F.2d at 533 ("In a wide variety of contexts, this and other circuits have upheld warrantless searches conducted during burglary investigations under the rubric of exigent circumstances."); *Commonwealth* v. *Fiore*, 403 N.E.2d 953, 955 (Mass. Ct. App.) ("It seems clear to us that a housebreak without more as set out in the affidavit raises the possibility of danger to an occupant and of the continued presence of an intruder and indicates the need to secure the premises. In such circumstances '[t]he right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as peace officers.' ") (citation omitted), *cert. denied*, 449 U.S. 938 (1980)). Hindsight discloses, of course, that Palazzola was mistaken. Nevertheless, *at the time, see Rodriguez*, 497 U.S. at 186, an officer confronted with these circumstances reasonably could have concluded that there was an imminent risk "to the lives or safety of the public." *Hegarty*, 53 F.3d at 1374, or to an injured or immobilized resident. *See, e.g., Murdock* v. *Stout*, 54 F.3d 1437, 1443 (9th Cir. 1995) (upholding warrantless search of residence following burglary report, where investigating officers found some signs that resident might have been at home when an intruder entered dwelling, and received no response to their calls, thereby creating a "fair probability that . . . a resident might be in need of assistance") (distinguishing prior circuit precedent in *United States* v. *Erickson*, 991 F.2d 529 (9th Cir. 1993)). Accordingly, the district court did not err in denying the motion to suppress.

B. *Motion for New Trial*

We turn now to the district court ruling denying a new trial. Tibolt contends that the "newly discovered" Gloucester Police

"incident cards" and the Lemieux affidavit support a rational inference that Officer Palazzola committed perjury at the suppression hearing, in explaining that the misleading placement of the Dombrowski mailbox at the opening of the second Tibolt driveway, and his own unfamiliarity with the two residences, had caused him to go to the Tibolt residence to investigate the reported alarm at the Dombrowski residence. Tibolt maintains that the incident cards show that Palazzola had been to the Dombrowski residence at least once before and, therefore, should have recognized his mistake on this occasion. Further, he argues, the Lemieux affidavit suggests that Palazzola's "mistake" was actually part of an elaborate, conspiratorial ruse, manufactured by the Gloucester Police task force to enable a warrantless search of the Tibolt residence for drugs. *Cf. Curzi*, 867 F.2d at 43 n.6 (noting that police may not justify warrantless search by manipulating events to generate "exigency"). Finally, in the affidavit supporting the search warrant application submitted on July 27, 1992 — presumably premised *solely* on the fruits of the warrantless search — the police failed to disclose their prior investigations of the Tibolt residence for suspected drug activities. Tibolt insists that the failure to disclose the prior investigations of the residence constituted a "clear violation" of *Franks* v. *Delaware*, 438 U.S. 154 (1978).

1. *Substantive Law*

A motion for new trial based on newly discovered evidence will not be allowed unless the movant establishes that the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial. *United States* v. *Ortiz*, 23 F.3d 21, 27 (1st Cir. 1994); *United States* v. *Natanel*, 938 F.2d 302, 313 (1st Cir. 1991), *cert. denied*, 502 U.S. 1079 (1992). If, however, the "new" evidence was within the government's

control and its disclosure was withheld, the third and fourth criteria are less stringent:

> The usual locution, taken from Justice Blackmun's opinion in *Bagley*, [473 U.S. 667 (1985)], is that the nondisclosure justifies a new trial if it is "material," it is "material" only if there is "a reasonable probability" that the evidence would have changed the result, and a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 682. . . . This somewhat delphic "undermine confidence" formula suggests that [a] reversal [and a remand for new trial] might be warranted in some cases even if there is less than an even chance that the evidence would produce an acquittal. After all, if the evidence is close and the penalty significant, one might think that undisclosed evidence creating (for example) a 33 percent chance of a different result would undermine one's confidence in the result. And while *Bagley* appears to give little weight to other factors — such as the degree of fault on the prosecutor's part and the specificity of the defense request — it is not entirely clear that these variables must be ignored.

United States v. *Sepulveda*, 15 F.3d 1216, 1220 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994).

2. *Standard of Review*

The denial of a motion for new trial is reviewed only for manifest abuse of discretion. *See United States* v. *Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980). The instant motion for new trial triggers a two-tier inquiry. First, to the extent the "new" evidence pertains to the disposition of the pretrial motion to

suppress financial records, wherein the *district court* was the trier of fact, Tibolt confronts the daunting task of demonstrating that the district court committed clear error in determining that the "new" evidence would not have altered its pretrial factual findings. *Zapata*, 18 F.3d at 975 (noting that factual findings and credibility determinations relating to suppression issues are normally for the trier of fact). Second, Tibolt must show that the "new" evidence would so undermine the government's case as to give rise to a "reasonable" probability of acquittal upon retrial. *Sepulveda*, 15 F.3d at 1220.[6]

3. *The Incident Cards*

We cannot say that the district court ruling constituted a manifest abuse of discretion. The district court found, *inter alia*, that the police incident reports would not suffice to undermine Officer Palazzola's credibility; hence, were not likely to result in an acquittal. *Tibolt*, 868 F.Supp. at 382. Nor are we persuaded that Palazzola perjured himself at the suppression hearing. Rather, he testified simply that he could not remember having been at the Dombrowski residence prior to July 27, 1992. In fact, the incident cards show that he was sent there on but *one* occasion — *three years* before the pretrial suppression hearing. Further, this incident card did not even compel the conclusion that Palazzola went to, or secured, the Dombrowski residence on *that prior occasion*. Thus, the district court was entitled to find that the incident cards did not undermine Palazzola's claimed lack of memory. *Cf. Natanel*, 938 F.2d at 313 (noting somewhat lesser burden on new-trial movant where evidence shows witness's prior testimony was "deliberately false"). Given their marginal direct probative value, we

[6] We assume, without deciding, that the "new" evidence was within the government's control and potentially subject to disclosure. *But see infra* Section II.B.4 (noting that government did disclose essential information, later reiterated in Lemieux affidavit, at pretrial suppression hearing).

cannot say that the incident cards alone were sufficient to generate a "reasonable" probability that Tibolt would be acquitted upon retrial. *Cf. Sepulveda*, 15 F.3d at 1220 n.5 (noting that newly discovered evidence pertaining exclusively to a government witness's credibility rarely warrants a new trial).

4. *The Lemieux Affidavit*

The district court found the Lemieux affidavit similarly inconclusive. Although the affidavit might contribute to a plausible inference of police conspiracy, it certainly did not *compel* such a finding, especially since its temporal relevance is so unclear. For one thing, it is not unreasonable to think that Lemieux may have been imprecise in recollecting the *sequence* of the events which had occurred a year and a half earlier. That is to say, there is nothing in the affidavit to suggest but what Lemieux may have been remembering that Tibolt was arrested and that an informant's tip simply *corroborated* what the officers themselves accidentally discovered. Nor does the Lemieux affidavit, vague as it is, make it probable that an acquittal would result upon retrial.

In all events, we need not rest our decision solely on the "credibility" ground, since the district court found also — with respect to the information in the Lemieux affidavit — that Tibolt had not met the first two prongs of the *Ortiz* test. *See Natanel*, 938 F.2d at 313 (failure to establish *any* of the four *Ortiz* factors defeats motion for new trial). The court further found that Tibolt had not shown that this "new" evidence was either unknown or unavailable at the time of the pretrial suppression hearing, nor that Tibolt had exercised due diligence to discover the evidence earlier. *See Tibolt*, 868 F.Supp. at 382 ("What is more, the government proffered at the suppression hearing the fact that Tibolt's home had been the subject of a local drug investigation before the search, and made available to Tibolt one of the officers involved in that investigation

for questioning."). At the pretrial suppression hearing, moreover, the government disclosed to the defense that Officer Williams participated in a previous task force surveillance of the Tibolt residence, and that "at that time there were *some reports* of possible drug activities involving that house." (Emphasis added.) This disclosure certainly should have alerted Tibolt to the probability that an informant was involved. Yet Tibolt failed to pursue information relating to whether the warrantless search of July 17, 1992 was a mere "ruse" designed to fabricate a showing of probable cause. Since the finding that Tibolt failed to exercise due diligence was not clearly erroneous, *see Zapata*, 18 F.2d at 975, he may not rely on this evidence to mount a renewed attack on the warrantless search or the search warrant application.[7]

The district court judgment is affirmed.

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[7] As noted above, *see supra* p. 4, Tibolt not only challenges the pretrial determination that Palazzola's *warrantless search* was valid, but cites *Franks* v. *Delaware* as authority for a direct challenge to the subsequent *search warrant*, which was premised entirely on the fruits of the earlier warrantless search. A defendant is not entitled to a *Franks* evidentiary hearing, however, absent a "substantial preliminary showing (1) that a false statement [or material omission] in the affidavit [supporting the search warrant application] has been made knowingly and intentionally, and (2) that the false statement [or material omission] is necessary for a finding of probable cause." *United States* v. *Scalia*, 993 F.2d 984, 987 (1st Cir. 1993) (*citing United States* v. *Rumney*, 867 F.2d 714, 720 (1st Cir.), *cert. denied*, 491 U.S. 908 (1989)).

We discern no principled basis for treating the *Franks* claim differently than Tibolt's direct challenge to the warrantless search. To the extent the "new" evidence underlying the *Franks* hearing request was available prior to trial (*i.e.*, the Lemieux affidavit) by the exercise of due diligence, Tibolt's post-trial *Franks* request based on that evidence is untimely." *See supra* Section II.B.4. The marginal probative value of the incident cards in undercutting Palazzola's pretrial testimony is insufficient, by itself, to support a "*substantial* preliminary showing" that the evidence, if disclosed, would have altered the decision that there was probable cause to issue a search warrant. *See supra* Section II.B.3; *see also, e.g., United States* v. *Hiveley*, 61 F.3d 1358, 1360 (8th Cir. 1995) (noting that "the 'substantial showing' requirement needed to obtain a *Franks* hearing is not lightly met").

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2221

UNITED STATES OF AMERICA,
APPELLEE,

v.

WILLIAM R. TIBOLT,
DEFENDANT, APPELLANT.

ERRATA SHEET

The opinion of this Court issued on December 29, 1995, is amended as follows:

Page 10, line 6, should read, ". . . at the Tibolt residence."

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-2221

UNITED STATES
APPELLEE

v.

WILLIAM R. TIBOLT
DEFENDANT - APPELLANT

Before

SELYA, Circuit Judge
COFFIN, Senior Circuit Judge
and CYR, Circuit Judge

ORDER OF COURT

Entered: January 22, 1996

Upon consideration of appellant's petition for rehearing, It is ordered that the petition for rehearing be denied.

By the Court:
William H. Ng, Clerk

By JANICE M. O'NEIL
Chief Deputy Clerk

cc: William C. Brown, Esq.
Anthony M. Cardinale, Esq.
Ronald J. Chisholm, Esq.